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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MELVIN L. LEVINSON - PETITIONER

vs.

BUDD FOODS, INC. - RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In deciding a Motion for Summary Judgment, did the District Court act properly in:

a. requiring a pro se to present his case only in writing?

b. denying the pro se an oral examination of his witnesses? and

c. not permitting the pro se to cross examine his adversary's witnesses?

If this court decides that the District Court acted properly, in deciding a Motion for Summary Judgment, "on the papers" and denying a pro se the oral hearing and/or the jury trial he requested, then is a patent holder, *who writes poorly*, who can not afford a patent trial lawyer, and who has evidence and witnesses to support his case, denied due process of the law?

The following list of precedents were cited and argued, by this petitioner but, the Petitioner's arguments, thereto, were not addressed by either lower court. Do the legal precedents, that follow, apply in pro se litigations? Must qualifications be added to the precedents that follow to make them applicable to pro se cases? For those precedents that, on their face, are good law, should the lower courts have informed the pro se why the court deemed his arguments, thereto, were defective?

a. "The facts establishing anticipation or obviousness must be proven by clear and convincing evidence," RCA Corp. v. Applied Digital Data Sys., Inc. (Fed. Cir. 1984)

b. "In deciding (summary judgment) motions, all

doubt respecting the presence or absence of factual issues must be resolved in favor of the party opposing summary judgment." Howes v. Medical Components Inc., (Fed. Cir. 1987)

c. "The movant bears the burden of demonstrating the absence of all genuine issues of material fact, and the district court must view the evidence in a light most favorable to the non moving party and draw all reasonable inferences in its favor." Hodosh v. Block Drug Co., Inc., (Fed. Cir. 1986)

d. "Anticipation will not be found in prior devices unless they furnish clear suggestion of improvement in question." Alliance Securities Co. v. J.A. Mohr & Son

e. "The scope of each individual claim must be examined on its own merits, apart from that of other claims, even in the same patent." Lemelson v. TRW, Inc. (C.A. Fed.1985)

f. "conclusory statement of infringement in attorney's affidavit was insufficient to preclude summary judgment of noninfringement for defendant." Johnston v. IVAC Corp., (Fed Cir. 1989)

g. "Because 'the test of claim interpretation is directed to one skilled in the art,' 'it makes sense . . . to elicit testimony from such individuals'" (Fed. Cir. 1986)

h. "No fact issue arises if the disputed term in a claim is not a technical term or a term of art with a special meaning to those skilled in the art or if the term is clearly defined in the patent specification." Howes v. Medical Components, Inc., (Fed. Cir. 1987)

Is a District Court justified in making a Summary Judgment of non-infringement when the court has before it four uncontested witnesses testifying that the claims, at issue, read literally on the product at issue?

Is it proper for the District Court to make a Summary Judgment of non-infringement, when the court does not have before it any witnesses testifying to non-infringement or rebutting the testimony of the witnesses who testified to infringement? Is it proper to grant a Summary Judgment while facts remain in dispute?

If uncontested testimony, as to common purpose, material, structure, function and results, is not sufficient to warrant a Summary Judgment finding of infringement, than what more is required?

If a court's opinion does not address a pro se's arguments or the legal precedents the pro se believes supports his case, how will the pro se know what is right and what is wrong? If because of the court's failure to write an opinion and so, uninformed, a pro se repeats what is unjust and avoids doing what is just, shall the pro se be held accountable for his later unjust actions? Does a pro se have a "Right to Know" why the lower courts are depriving him of that which the United States Patent Office led him to believe he patented?

If a court decides that the United States Patent Office misinterpreted the art that, prior granting Letters Patent, the Patent Office considered, is an award of costs, against the patent holder, justified?

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NO. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term, 1990

MELVIN L. LEVINSON, Petitioner, Pro Se

vs.

BUDD FOODS, INC., Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner, Melvin L. Levinson, respectfully prays that a writ of certiorari issue to review the judgment without opinion of the United States Court of Appeals for the Federal Circuit that affirms the Opinion of a judge of the New Jersey District Court. The District Court Judge's findings conflict with findings of other judges in the same courthouse and in other District Courts. The District Court Judge's findings are not consistent with practice in the United States Patent Office, the Discovery Rules of the Federal Rules of

Civil Procedure, opinions of the Court of Appeals for the Federal Circuit and opinions of this court (for example, see infra, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986)).

OPINIONS BELOW

The District court's unpublished written opinion, granting summary judgment of non infringement and denying summary judgment of infringement, appears as APPENDIX A. The District Court's unpublished written opinion denying reconsideration appears as APPENDIX B. The Court of Appeals' "JUDGMENT", without opinion, that affirms the District Court's opinion; and, the Court of Appeals' denial, without opinion, of the following four motions: 1) a Motion for Rehearing, 2) a Motion for Rehearing in Banc, 3) a Motion to be Granted Due Process of Law, and 4) a Motion to Reconsider Award of Costs, all appear as APPENDIX C. Not one, of the Court of Appeals' five rulings, address the Petitioner pro se's carefully thought out arguments.

JURISDICTION

The Court of Appeals' Judgment was filed February 6, 1991. The Court of Appeals' denial of the "Petition for Rehearing" was filed March 1, 1991. The Court of Appeals' Order, denying "Motion to be Granted Due Process," was filed March 8, 1991. The Court of Appeals' Order, denying "Motion to Reconsider Award of Costs," was filed March 8, 1991. The Court of Appeals' Order, declining "Suggestion for Hearing in Banc," was filed March 25, 1991. This Court's jurisdiction is invoked under Title 28, U.S.C. par. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner appears pro se with no formal training in law. He believes that, in this case, the lower courts erred when they applied:

ARTICLE VII of the Constitution. "In suits at common law . . . the right of trial by jury shall be preserved . . . "

ARTICLE V of the Constitution. "No person shall be . . . deprived of . . . property, without due process of law . . . "

Section 8 of the Constitution. "The Congress shall have the power . . . To promote the progress of science and useful art, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"

The U.S. Statute, 35 U.S.C. 271, pertaining to patents.

The Federal Rules of Civil Procedure concerning Discovery and Summary Judgment.

STATEMENT OF THE CASE

The Petitioner, a pioneer inventor in microwave cooking technology, has prosecuted infringers and defended his patents, both in the District Courts and in the Court of Appeals for the Federal Circuit.

The two patents, at instant issue, concern defrosting and heating food, in a microwave oven, while packaged in an aluminum container within a paper container. Petitioner contends that, if he was allowed to present his witnesses and evidence and to cross examine his adversary before the trier of the facts, that he would have demonstrated that each of his seven apparatus

claims and six method claims read literally on Respondent's chicken pot pie product.

Petitioner, pro se, asked for a jury trial. Respondent moved for summary judgment of non infringement. Petitioner cross-motioned for a summary judgment of infringement.

Petitioner, an acknowledged expert, and his expert witnesses testified to literal infringement. Petitioner's evidence and the sworn testimonies of Petitioner's expert witnesses were uncontested.

In contrast, Respondent did not offer even one expert in patent law or a witness skilled in the art of microwave cooking to support Respondent's allegation of non infringement or rebut Petitioner's witnesses.

Without an expert in patent law, or an expert skilled in the art of microwave cooking or a witness knowledgeable about prior art microwave cooking practice, Respondent alleged invalidity. Respondent alleged that Petitioner's thirteen different claimed ways to cook Respondent's product, in a microwave oven, were all obvious simply because packaged pies, per se, and microwave ovens, per se, were known in the prior art. The District Court arbitrarily adopted Respondent's allegation and ruled "The Court determined and here reiterates that whatever Levinson's claims may be, Budd has established that its packaging and its microwaving capabilities are indistinguishable from this prior art."

The District Court's determination of obviousness was made without first requiring a Graham analysis of obviousness[1]. The District Court concluded that

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1. Graham v. John Deere Co., 333 F.2d 529, 142 USPQ 243 (8th Cir. 1964) *cert. granted* 379 U.S. 956 (Jan. 18, 1965)

"obviousness" proves "non infringement."

The Court of Appeals, in a denial of their own precedents, decided that the District Court acted properly. Petitioner pro se believes that the lower court's convoluted findings are not logical. The Petitioner believes that the District Court judge adopted the Arguments of the Respondent's four Lawyers and ignored the precedent and law argued by Petitioner, a pro se of little importance, simply to clear his calender.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the following reasons:

1. A grant of Letters Patent, authorized by the Constitution, is worthless if the Court's do not evenhandedly enforce the grant against infringers.

2. There must be justice for all patent holders, whether great or small. Justice should not be limited to those can afford the high fees charged by patent trial lawyers.

3. The Local and Federal rules, legal precedents, and Supreme Court decisions, a) should have uniform meaning, b) should be logical, clear and comprehendible to, at least, a high school graduate, and c) they should be enforced even if their enforcement embarrasses those in high places.

4. After receipt of the Court of Appeals "Judgment" without Opinion denying Petitioner's appeal, Petitioner filed four rehearing motions. The four motions were denied without opinion. There are many conflicts in law and practice, identified in these motions, which the Court of Appeals left unresolved. The motions follow:

I. LETTER MOTION SUBMITTED TO THE

COURT OF APPEALS TO BE GRANTED DUE PROCESS OF LAW:

"A. LEVINSON WAS NOT AFFORDED DUE PROCESS OF LAW IN THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Court of Appeals for the Federal Circuit affirmed the District Court's findings without expressing an opinion on the issues raised in LEVINSON's Brief. LEVINSON was not informed which of the multiple issues raised, the Court of Appeals for the Federal Circuit found in error. LEVINSON, pro se, believes that, at least, some of the issues he raised are correct. If a pro se advances multiple arguments, as in this civil action, and he is not told which arguments are right or which arguments are wrong, from that time on, confused, a pro se could repeat what is unjust and avoid doing what is just. In pro se cases, the Court of Appeals for the Federal Circuit failure to write an opinion denies the pro se "Due Process of Law".

B. LEVINSON WAS NOT AFFORDED DUE PROCESS OF LAW IN THE DISTRICT COURT

1. In BUDD's Motion for Summary Judgment of Non-Infringement, the District Court was asked to hear oral arguments. *Levinson, pro se, appeared, on the date scheduled for the Summary Judgment hearing expecting to be allowed to present his evidence and witnesses and to cross examine his adversary. The trial court would not hear oral arguments.*

The District Court based its decision on conclusory statements of BUDD's attorneys, and based its opinion on snippets, twisted and taken out-of-context by BUDD, of Levinson's deposition testimony. LEVINSON was denied his right, in open court, to express the true

meaning of his deposition testimony. *A pro se's Constitutional Right to due process of law is denied when a pro se is required to present his case in writing and is* ***denied the opportunity to examine his own witnesses and to cross examine his adversary's witnesses before the trier of the facts.*** What should a middle class pro se, who writes poorly, who is not wealthy enough to pay $200 an hour for a patent trial lawyer, but who has evidence and witnesses to support his case, do to obtain due process of the law 1) before the District Court and 2) before the Court of Appeals for the Federal Circuit?

2. During the Summary Judgment proceeding, the trial court permitted LEVINSON 1) to amend his complaint to add two claims and 2) to ask interrogatories directed to these two claims. The District Court findings were premature because BUDD's interrogatory answers stated that **BUDD had not yet completed its analysis of infringement and validity concerning these two claims.** While LEVINSON's allegations to these two claims were not contested by BUDD and BUDD was still completing its analysis of these claim, the trial court lumped these two claims with the other claims, at issue, and, arbitrarily, ruled that BUDD did not infringe these two claims as well as the other claims.

3. The trial judge did not consider LEVINSON's supplemental brief (e.g. a proper brief filed before the District Court wrote its opinion). The District Court's failure, to consider a Brief, denied LEVINSON due process of law.

The District Court found and the Court of Appeals for the Federal Circuit affirmed non-Infringement of thirteen (13) Claims in two U.S. Patents without due process of law."

MOTION DENIED WITHOUT OPINION

II. LETTER SUGGESTION FOR HEARING IN BANC

"Levinson, pro se, suggests a rehearing of the Court of Appeals for the Federal Circuit Judgment, entered February 6, 1991, without Opinion, in Banc, **due to the conflict with established precedents it raises.**

The District Court's findings, affirmed by the Court of Appeals for the Federal Circuit, are inconsistent with the law and contrary to established Court of Appeals for the Federal Circuit precedents. LEVINSON testified that every fact, law and precedent before the District Court was in his favor. The District Court's findings, affirmed by the Court of Appeals for the Federal Circuit, allowed to stand, demonstrate: 1) that previous Court of Appeals for the Federal Circuit decisions do not mean what they literally say, 2) that, before the Court of Appeals for the Federal Circuit, a pro se is not afforded due process of law, and 3) a pro se does not have the right to know what he is accused of doing wrong or what he did right and what his paid patent attorney expert did right or wrong.

LEVINSON raised six major issues. Any one of which should have compelled the Court of Appeals for the Federal Circuit to reverse the District Court's finding. LEVINSON's evidence and the sworn testimony of LEVINSON's expert witnesses were uncontested. In contrast, BUDD did not offer even one expert in patent law or a witnesses skilled in the art of microwave cooking to support BUDD's allegations. The District Court finding, affirmed by the Court of

Appeals for the Federal Circuit, relied upon the contrived allegations, conjecture and unsupported, conclusory statements of BUDD's attorneys.

The precedents cited and LEVINSON's comments thereto follow:

The facts establishing anticipation or obviousness must be proven by clear and convincing evidence, RCA Corp. v. Applied Digital Data Sys., Inc. 730 F.2d 1440, 221 U.S.P.Q. 385 (Fed. Cir. 1984).

BUDD's attorney's prejudiced, unsupported conjecture is not clear and convincing evidence.

Anticipation will not be found in prior devices unless they furnish clear suggestion of improvement in question. Alliance Securities Co. v. J.A. Mohr & Son, DCCA11925, 14 "2d 793, affirmed 14 F2d 799.

In BUDD's Motion for Summary Judgment, there is no clear and convincing evidence that LEVINSON's **claim limitations, taken together,** were in the prior art.

The scope of each individual claim must be examined on its own merits, apart from that of other claims, even in the same patent. Lemelson v. TRW, Inc., C.A. Fed.1985, 760 F.2d 1254.

The District Court's findings, affirmed by the Court of Appeals for the Federal Circuit, completely ignored this precedent. The District Court's findings, affirmed by the Court of Appeals for the Federal Circuit, address all the claims as a unit. LEVINSON asked this court to determine in Banc that patent claims, not individually argued, at a Summary Judgment hearing, are still in issue and are still presumed valid.

"In deciding (summary judgment) motions, all doubt respecting the presence or absence of factual issues must be resolved in favor of the party opposing

summary judgment." (emphasis added) Howes v. Medical Components Inc., 814 F.2d 638, 643 (Fed. Cir. 1987)

"The movant bears the burden of demonstrating the absence of all genuine issues of material fact, and the district court must view the evidence in a light most favorable to the non moving party and draw all reasonable inferences in its favor." Hodosh v. Block Drug Co., Inc., 786 F.2d 1136, 1141 (Fed. Cir. 1986) cert. denied, 479 U.S. 827, 93 L. Ed.2d 55, 107 S.Ct. 106 (1986).

The *factual* issues and material *facts*, set forth by LEVINSON's four witnesses, demonstrating *literal infringement*, were not contested by BUDD. Notwithstanding, the District Court found and the Court of Appeals for the Federal Circuit affirmed non infringement.

BUDD cites, Johnston v. IVAC Corp., 885 F.2d 1574, 1578, 12 U.S.P.Q. 2d 1382, 1385 (Fed Cir. 1989).

"conclusory statement of infringement in attorney's affidavit was insufficient to preclude summary judgment of noninfringement for defendant."

LEVINSON's patent expert's opinion of literal infringement was corroborated by the affidavits of three LEVINSON witnesses. BUDD's attorneys made unsupported "conclusory" allegations. In contrast to LEVINSON's four witnesses, BUDD had no expert witness, skilled in either patent law or microwave cooking, supporting its allegation of noninfringement. Notwithstanding, the District Court found and the Court of Appeals for the Federal Circuit affirmed non infringement.

The District Court's finding, affirmed by the Court of Appeals for the Federal Circuit, suggests that the comparison of LEVINSON's patent claims to BUDD's Product, by Mr. Harry Keck, LEVINSON's patent "expert", is "conclusory" and of no merit simply because Mr. Keck is Levinson pro se's patent attorney. Mr. Keck has been a patent attorney for 38 years and has many clients. Mr. Keck has no interest in the outcome of this action. For Levinson, pro se, it seemed natural to seek patent advice from a patent attorney who he knows to be competent. If Levinson needed medical advice, he would go to his family doctor.

Mr. Keck's unrebutted testimony, that LEVINSON's patent claims read literally on BUDD's product, should not have been discounted by the District Court. The District Court should have found that Mr. Keck, a patent attorney, is qualified to make the infringement analysis of literal infringement in evidence. The District Court should have found that Mr. Keck's qualifications were not challenged by BUDD.

If patent expert's opinions, on patent matters, are deemed unsupportable and conclusory simply because they are employed by a party, this court should make every effort to inform the public. Most patent litigants employ paid patent experts.

Mr. Keck's expert opinion and analysis of literal infringement is corroborated by the affidavits of Levinson, pro se, and his experts.

LEVINSON's patent attorney has no interest in the outcome of this action. In contrast, BUDD's attorneys have a real interest in the outcome of this action. Ignoring LEVINSON's evidence and LEVINSON's witnesses testimony demonstrating literal

infringement and relying on the unsupported, conclusory statements of BUDD's attorneys, the District Court found and the Court of Appeals for the Federal Circuit affirmed **non** infringement.

LEVINSON cites, additional, Court of Appeals for the Federal Circuit decisions in conflict with the instant decision:

"Because 'the test of claim interpretation is directed to one skilled in the art,' 'it makes sense . . . to elicit testimony from such individuals'", Moeller v. Ionetics, Inc., 794 F.2d 654, 229 USPQ 992 (Fed. Cir. 1986).

LEVINSON had four witnesses skilled in the art interpreting the claims. BUDD had no witness skilled in the art. This court improperly relied upon BUDD's attorney per se's claim interpretation to affirm non-infringement.

"No fact issue arises if the disputed term in a claim is not a technical term or a term of art with a special meaning to those skilled in the art or if the term is clearly defined in the patent specification." Howes v. Medical Components, Inc., 814 F.2d 638, 2 USPQ2d 1271 (Fed. Cir. 1987)

THE claim limitation "liquid absorptive material" was defined in the specification as **"cardboard."** "Cardboard" is not a technical term, or a term with special meaning, and is a term clearly defined in the specification. LEVINSON's witnesses argued that BUDD's box was made of cardboard (undisputed). BUDD's attorney per se (e.g., BUDD had no witnesses skilled in the art) argued that LEVINSON's claim limitation "liquid absorptive material" was not the "cardboard" of its box or the "cardboard" of the Specification. Without explanation, the District Court

agreed with BUDD's attorney, per se's allegation and the Court of Appeals for the Federal Circuit agreed with the District Court. The court's findings gives rise to a new puzzle for the public to solve, "When is "cardboard" not "cardboard?"

HEARING IN BANC DENIED WITHOUT OPINION

III. LETTER PETITION FOR RECONSIDERATION OF JUDGMENT ENTERED FEB. 6, 1991

"Please, reconsider the Judgment, entered February 6, 1991. Consider the issues and precedents separately so LEVINSON, pro se, and others, pro se, that appear before the Court of Appeals for the Federal Circuit, may know what is right from what is wrong.

The New Jersey District Court judge's findings, affirmed by the Court of Appeals for the Federal Circuit, conflicts with findings of other judges in the New Jersey District Court, practice in other District Courts, with accepted Patent Office Practice, the Discovery Rules of the Federal Rules of Civil Procedure, and published opinions of the Court of Appeals for the Federal Circuit. Please, on reconsideration, resolve this conflict and publish an opinion which will be citable as a precedent. Levinson, pro se, is writing a guide for other inventors and wants to make sure his facts are right.

FACTS THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT IS ASKED TO RECONSIDER:

1. The sole question, before the District Court, was INFRINGEMENT not validity. The District Court entertained BUDD's validity arguments and ignored LEVINSON's infringement arguments.
2. LEVINSON's *four (4) Expert witnesses'* testified

that LEVINSON's invention and BUDD's product are identical in *purpose, structure, material, function and result*. LEVINSON's four Experts testified that LEVINSON's patent claims read directly on BUDD's product. Until the Court of Appeals for the Federal Circuit affirmed the District Court's findings, LEVINSON believed that if patent claims read literally on a product, the patent claims must be infringed. Why the exception in this case?

3. LEVINSON's finding of literal infringement, is supported by an analysis made by Mr. Harry Keck, Esq., *who,as a patent lawyer with 38 years of experience, is qualified to testify and who has no interest in the outcome of this action.* Mr. Keck's claim analysis attests to Budd's literal infringement of the two patents at issue. The uncontested declarations of LEVINSON's witnesses, Melvin Levinson, Seth Levinson and Lillian Handel, all qualified by training and experience, corroborate Mr. Keck's analysis of literal infringement.

4. LEVINSON's finding of literal infringement, is supported by:

a. Melvin Levinson, skilled in the art of microwave heating for almost 30 years, attests to literal infringement by Budd.

b. The Jury, in Levinson v Litton, found that a TV dinner, cooked in a **closed** box, infringed Levinson's patents. BUDD'S box is **closed**.

c. As defined by the Court of Appeals for the Federal Circuit in Levinson v. Litton and as defined by the patent specification and the file history, LEVINSON's claim limitations all read directly on Budd's product.

The analysis, by LEVINSON's four witnesses, of literal infringement, was not contested. Notwithstanding,

the District Court found non infringement and the Court of Appeals for the Federal Circuit affirmed.

5. The Litton Cookbook, the District Court considered, as prior art to LEVINSON's patents, was determined, in a related civil action, Levinson v. Litton, to be **not** germane to the "closed box" issue before this court. In Levinson v. Litton, the Litton Cookbook was considered to be **post** art to the claims at instant issue.

6. The District Court based its findings on a BUDD allegation that it was known, in the prior art, to cook pies, identical to BUDD's pies, in a microwave oven. BUDD's allegation was not supported by fact or evidence and remains untrue. BUDD's allegation flies in the face of the PTO issuing the **two** patents at issue.

7. A timely filed LEVINSON Brief was not considered by the trial court. This District Court's failure, to consider LEVINSON's timely filed Brief, denied LEVINSON due process of law. The Court of Appeals for the Federal Circuit failed to address or correct this injustice.

8. The question before the District Court was infringement. The District Court failed to start with the presumption that each claim is patentably distinct. In determining infringement, the District Court failed to compare the individual claim limitations to BUDD's product.

9. BUDD, by interrogatory answer, establish that it had not yet prepared its case pertaining to the infringement of claims 7 and 13. Without waiting for BUDD to prepare its case, the District Court, arbitrarily, found that claims 7 and 13 were not infringed. The District Court ignored LEVINSON's experts testimony that claims 7 and 13 were literally infringed.

10. BUDD's made a test, in light of LEVINSON's patent teachings, which confirmed the utility of LEVINSON's invention.

11. BUDD's allegations were conclusory statements made by BUDD's attorneys. BUDD offered no evidence or witnesses to support its allegations. The District Court did not require BUDD's attorneys to support their self serving statements the old fashion way with evidence.

12. LEVINSON's constitutional right to due process of law was violated when LEVINSON was denied permission to cross examine BUDD or to examine his evidence and witnesses in open court.

LEVINSON was denied his right to cross examine his adversary and to examine his witnesses and to present his evidence in open court. Material facts remain in dispute. Why the Court of Appeals for the Federal Circuit affirmed this travesty of justice remains a mystery?

LEVINSON repeats the questions set forth in "LEVINSON's Response to BUDD's Brief". The Court of Appeals for the Federal Circuit's failure to write an opinion, necessitated the filing of this motion for reconsideration:

1. Did the District Court base its findings on unsupported allegations and conclusory statements of Budd's attorneys? LEVINSON is not aware of any hard evidence which supports the District Court's findings.

2. How does the Court of Appeals for the Federal Circuit decision, in Johnston v. IVAC Corp., 885 F.2d 1574, 1578, 12 U.S.P.Q. 2d 1382, 1385 (Fed Cir. 1989) apply to this case? LEVINSON contends that Johnston v. IVAC. supports LEVINSON's case, and not BUDD's case as the District Court found.

3. What evidence did the District Court rely on to upset the finding of literal infringement by LEVINSON's witnesses? The District Court's opinion did not address the individual testimony of LEVINSON's four witnesses or challenge their qualifications.

4. Are one or more of LEVINSON's claims infringed? LEVINSON's thirteen, patentably distinct claims were not individually addressed.

5. What evidence did the District Court rely on to conclude that cardboard (e.g. paper) will not absorb liquid? LEVINSON testified that BUDD's cardboard was porous. The District Court ignored LEVINSON's testimony and found that cardboard will not absorb water. Does the Court of Appeals for the Federal Circuit affirm that cardboard will not absorb water?

6. Since the issue of validity was **not** raised in the moving papers, was it proper to argue validity? Since Budd was permitted to argue validity, should the District Court have made a Graham analysis? Validity and infringement are separate and distinct questions.

The Summary Judgment Motion, before the District Court, was limited to the question of infringement. The question of validity was **not** before the District Court. BUDD argue validity not infringement. LEVINSON argued infringement not validity. Should the District Court have restricted arguments to the issue of infringement and reserved arguments concerning validity for an appropriate time?

The question of validity is still before the District Court unless the Court of Appeals for the Federal Circuit mandate dictates otherwise.

LEVINSON's four witnesses' testimony to literal infringement was uncontested. The Court of Appeals

for the Federal Circuit is asked to reconsider its judgment and find that BUDD's product infringes one or more of claims 1, 3, 5, 6, 7, 11 and 13 of U.S. Patent No. 3,854,023 and one or more of claims 1, 4, 5, 8, 12, and 13 of U.S. Patent No. 3,985,991."

MOTION FOR RECONSIDERATION DENIED WITHOUT OPINION

IV. LETTER MOTION SUBMITTED TO THE COURT OF APPEALS FOR COURT OF APPEALS TO RECONSIDER AWARD OF COSTS

"LEVINSON asks this court to reverse the award of costs, or, in alternate, to assign an award of cost to be paid by the UNITED STATES PATENT AND TRADEMARK OFFICE and/or by LEVINSON's patent attorney, Mr. Harry Keck, Esq.

1. Before allowing LEVINSON's two patents at issue, the United States Patent Office considered ***the same prior art as did the District Court and the Court of Appeals for the Federal Circuit.*** LEVINSON, pro se, relied on the presumption of validity of his patents.

2. LEVINSON's patent attorney considered the two patents at issue, their file histories and the facts elicited in a prior litigation. LEVINSON's patent attorney, with 38 years of experience as a patent attorney, sent BUDD a detailed analysis of why BUDD's product infringed LEVINSON's claims. The District Court found and the Court of Appeals for the Federal Circuit affirmed that, simply because LEVINSON's patent attorney once worked for LEVINSON, it was improper to consider his testimony.

Levinson, pro se, 1) relying on the PTO's good offices that his improved apparatus and his improved

methods of microwave cooking were new and patentable and 2) relying upon the competence of his patent attorney's determination, that BUDD's product literally infringed LEVINSON's claims, undertook this civil action. In good faith, LEVINSON paid the PTO, for determining patentability, and paid his patent attorney for his detailed analysis of BUDD's infringement. The District Court found and the Court of Appeals for the Federal Circuit affirmed that the PTO and LEVINSON's patent attorney "expert" made material errors.

Since LEVINSON would not have brought suit against BUDD if not for the action of the Patent Office and his hired patent attorney, the burden of costs should not be on LEVINSON."

MOTION DENIED WITHOUT OPINION

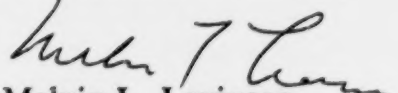
CONCLUSION

In deciding summary judgment, this court teaches "the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff, The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of evidence that the plaintiff is entitled to a verdict" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986) Petitioner, an acknowledged expert, and his expert witnesses testified to literal infringement. Petitioner's evidence and the sworn testimonies of

Petitioner's expert witnesses were uncontested. In contrast, Respondent did not offer even one expert in patent law or a witnesses skilled in the art of microwave cooking to support Respondent's allegation of non infringement or rebut Petitioner's witnesses. Embodied in the just recited facts "must be evidence on which the jury could reasonably find for the" Petitioner. In this action, summary judgment was not warranted and this case should be remanded for trial.[1]

Dated: April 26, 1991

Respectfully submitted,



Melvin L. Levinson
Petitioner, pro se

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1. If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for a written opinion on the arguments presented in this writ of certiorari and the motions embodied therein.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 89-1297
Melvin L. Levinson v. Budd Foods, Inc.

OPINION

Filed Jun 18, 1990

Not for Publication

This matter arises before the Court on the basis of a motion of defendant Budd Foods, Inc. (Budd) for summary judgment and dismissal of a Complaint that alleges infringement by Budd's pot pie container of several claims of plaintiff Levinson's United States Patent Nos. 3,854,023 ('023) and 3,985,991 ('991). Levinson has cross-moved for summary judgment.

I. FACTS AND BACKGROUND

The facts underlying this patent litigation are set forth in detail in this court's Opinion of December 1, 1989 at pages 2 through 5. Briefly stated for the purposes of the motions sub judice, the parties dispute centers on a comparison of the microwaveable features of the packaging patented by Levinson in 1973 and 1976 and of the packaging used by Budd.

A. The '023 Patent

The Abstract for Levinson's '023 patent (1974) states that it is

> [a]n improved heating member for microwave heating comprising a microwave-reflective heat-conductive container with an obverse surface which limits the depth of penetration of microwave energy into an oven load when said load is located in

surface contact thereon and with a reverse surface which shields, from exposure to microwave energy, liquid condensation when received thereon, and a microwave-permeable, liquid-absorptive body disposed to absorb liquid from said reverse surface and transport by capillary action said liquid to a location exposed to said microwave energy.

In other words patent '023 describes a metal container set within a paper container with certain microwave heating capabilities.

In this litigation, plaintiff Levinson originally asserted claims 1, 3, 5, 6, and 11 of the 14 claims associated with patent '023. Each of these claims states or incorporates a recitation that the patent includes a microwave-shielding heat-conductive food receptacle (in the form of a metal tray) and a microwave-permeable, liquid-absorptive body to convey liquid which has condensed on a surface of the food receptacle opposite the food, away from that surface to a location less shielded from microwave radiation.

B. The '991 Patent

Levinson's '991 patent letter (1976) includes the following abstract of that patent's features:

Methods of using an improved heating member for microwave heating comprising: (1) a microwave-reflective, heat-conductive container with an obverse surface which limits the depth of penetration of microwave energy into an oven load when said load is located in surface contact thereon and with a reverse surface which shields, from exposure to microwave energy, liquid condensation when received thereon, and (2) a microwave-permeable, liquid-absorptive body disposed to absorb liquid from said reverse surface and

transport by capillary action said liquid to a location exposed to said microwave energy.

Patent '991 has 15 claims of which Levinson has asserted infringement of 1, 4, 5, 8, 12, and 13 in this litigation. All the asserted claims except number 12 describe or incorporate a microwave-shielding heat-conductive food receptacle (a metal tray) and the means to convey liquid condensed on a surface of the food receptacle opposite the food away from that surface to a location less shielded from microwave radiation (a paper container). Claim 12 differs only in that it further describes the microwave-permeable heating chamber's ability (1) to impede vapor release and evaporation so that it can condense on the side of the metal container opposite to the side that holds the food, and thereby (2) heat the underside of the food that would otherwise be less exposed to radiation.

In motions returnable on April 9, 1990, Budd argued for summary judgment, and Levinson appealed the denial by G. Donald Haneke, United States Magistrate, of his motion for leave to amend his complaint to include allegations that Budd had infringed claims 7 and 13 of the '023 patent. On April 17, 1990, this court entered an order (1) reversing Judge Haneke's denial of leave to amend the complaint, (2) adjourning consideration of Budd's motion for summary judgment until June 11, 1990, and (3) staying discovery on all matters except those relevant to claims 7 and 13 of the '023 patent pending adjudication of the parties' cross-motions for summary judgment. Those claims will be addressed in detail later in this Opinion. Briefly stated, they incorporate into Levinson's '023 patent a water-proofing element on the heating member (claim 7) and a heating member that is completely enclosed (claim 13).

DISCUSSION

A. The Parties' Products

Budd's packaging is not patented. Its pies are sold in what it calls aluminum foil trays within allegedly conventional cardboard boxes which instruct the customer to place the pie (while still in its unopened box) into a microwave oven and heat for 5-6 minutes or until the food is hot. Levinson claims that Budd's box for microwave cooking infringes his '023 patent and that Budd's instructions to place its box in a microwave oven infringes the '991 patent.

It is not disputed that frozen pies have been sold in aluminum foil pans packaged in closed cardboard boxes at least since 1960. The microwavability of such food containers has been known at least since 1971 when Litton Systems published a booklet entitled An Exciting New World of Microwave Cooking. (See Defendant's Br., Exh. D, and United States Patent Number 3,271,169 which was granted to Baker in 1966). Levinson claims that his invention consisted primarily of heating in the package that people usually disposed of before. However, the 1971 Litton cookbook suggested that "you may place the uncovered tray back into its paper carton which holds in heat."

. The Core of the Present Dispute

Budd contends (1) that the technological advance which entitled Levinson to receive letters of patent numbers '023 and '991 is a separate heat transfer and absorptive, wicking feature for even microwave heating, and (2) that that feature is not part of its cardboard container. For his part, Levinson insists that Budd's package instructions and package configuration infringe his patent claims. Thus the question to be addressed by this summary judgment is whether the features of

Budd's packaging, including its instructions to leave the package closed in heating constitutes features of the prior art or obvious derivations therefrom, or whether they in fact infringe any of the claimed technological advances of Levinson's patents.

Budd contends that as a matter of law, its cardboard box conforms to the art of microwavable food packaging that was available before Levinson's patents and that Levinson's claims of infringement by Budd depend upon his invalid incorporation of the public domain prior art into his patents. Levinson has cross-moved for summary judgment that Budd has infringed and is infringing the two patents in dispute here.

C. The Summary Judgment Motion

Under Federal Rules of Civil Procedure 56(c), summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law." In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party, and any reasonable doubt as to the existence of a genuine issue of fact is to be resolved against the moving party. Contental Insurance Co. v. Bodie, 682 F.2d 436, 438 (3rd Cir. 1982). The moving party has the burden of establishing that there exists no genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 321 (1986).

The Supreme Court recently stated that in applying the criteria for granting summary judgment,

> the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a

> verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff, The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of evidence that the plaintiff is entitled to a verdict . . ..
>
> Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

Budd's motion for summary judgment on Levinson's unamended complaint appeared to bottom of two related claims: (1) that Levinson's patent claims embrace the art available and in use prior to the patents he was granted and are therefore invalid; and (2) that the Budd packaging does not infringe any claim of Levinson's patents numbered '023 and '991. Because neither party has submitted further papers in response to Levinson's amended complaint, the court assumes that the underpinnings of Budd's motion and Levinson's cross-motion for summary judgment are unchanged.

To prevail on its motion for summary judgment in the present matter, Budd must show that Levinson has not been able to create any inference or generate any factual dispute whether Budd's packaging reflects the art available prior to Levinson's patent letters. To prevail on his cross-motion, Levinson must show that as a matter of law Budd's packaging and instructions infringe one or more claims of his patents '991 and '023.

D. The Statutory and Case Law Standard for Application to Allegations of Patent Validity and Infringement

Title 35 U.S.C. par. 282 provides that

> [a] patent shall be presumed valid. Each claim of a patent (whether independent or dependent form) shall be presumed valid independently of the validity of other claims; dependent claims shall be presumed valid even though dependent upon an invalid claim. The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting it.

See also Solder Removal Co. v. USITC, 582 F.2d 628 (CCPA 1978).

As a step towards meeting its burden of proof of the invalidity of the patent claims asserted by Levinson in this litigation, Budd contends that its package is conventional; that is, that it was used before the time of Levinson's patents and by others in the field besides itself. Budd states that if Levinson's claims cover such conventionally packaged pot pies, they are invalid because these boxes are part of the prior art. Further Budd asserts that Levinson has himself surrendered any claims that his patents included the prior art in this field (conventional cardboard packages) by relying in his presentation to the United States Patent Office on a test favorably comparing results of microwaving in Levinson's improved microwave-permeable, liquid absorptive body against similar heating of a Stouffer beef pie in its cardboard package.The Court notes that Levinson has failed to come forward with any viable refutation of Budd's allegations either that its package does not infringe what Levinson's patents present as advances over the prior art or that Budd's packaging differs from the microwave pie packages that have been on the market since at least 1960. Therefore, Levinson finds himself in a bind. If he contends that

the claims made in patents '023 and '991 preclude Budd's unlicensed use of cardboard packaging, he cannot be heard to say on this record that his patent claims are valid.[1] At the same time, if Levinson contends that the claims made in patents '023 and '991 embody an advance over the prior art, he cannot be heard on this record to say that Budd's cardboard package infringes those claims.[2]

As stated earlier, the record indicates that the central feature claimed in Levinson's patents is the package's ability to convey condensed liquid during the

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1. In Carman Inds., Inc. v. Wahl, 724 F.2d 932, 937 n.5 (Fed. Cir. 1983). the court stated

> Although related, validity and infringement are separate issues. The validity of a patent is determined under the applicable criteria of patentability. One of the limitations on the use of the doctrine of equivalents is that the claims cannot be accorded a construction that would encompass prior art. Thomas & Betts Corp. v. Litton Sys., Inc., 720 F.2d 1572 (Fed Cir. Nov. 14, 1983), rev'g Thomas & Betts Corp. v. Winchester Elecs. Div. of Litton Sys., Inc., 519 F.Supp. 1191, 213 U.S.P.Q. 943 (D. Del. 1981).

2. It is true that in Lemelson v. TRW, Inc., 760 F.2d 1254 (Fed.. Cir. 1985), the Federal Circuit held that "[i]t would be improper to, . . . , in evaluating validity to view each patent in suit as an indivisible unit by looking to a purported invention of each. Rather, the scope of each individual claim must be examined on its own merits, apart from that of other claims, even in the same patent." (Id. at 1267 (citing 35 U.S.C. par 282)). However, this court is adjudicating allegations of infringement, rather than validity. Further, the Court has determined that all the claims of patent '023 that Levinson alleged were infringed in his complaint (prior to the amendment permitted here) set forth only a package type and a cooking method.

heating process from the outer surface to an area less shielded from microwave radiation, thus allegedly providing more even heating without creating excess liquid retention. To the extent that his patent is contingent on the existence of that liquid-conveying feature, his success in establishing that Budd has infringed his patents depends on showing that Budd has incorporated that feature in its own package.

"Claims should be so construed. if possible to sustain their validity. Turrill v. Michigan S. & N.J.R.R. Co., 1 Wall. 491, 510, . . . (1864); Klien v. Russell, 19 Wall. 433, 466, . . . (1874). If such construction would result in invalidity of the claims, the appropriate legal conclusion is one of non-infringement, not invalidity." Carmen, 724 F.2d 932, 937 n.5. See also RCA Corp. v. Applied Digital Data Systems, Inc., 730 F.2d 1440, 1444 (Fed. Cir. 1984) (the facts establishing obviousness of a patent's claims must be proven by clear and convincing evidence). However, the patent owner bears the burden of proof on the issue of infringement of a patent. Roper Corp. v. Litton Sys., Inc., 757 F.2d 1266, 1271; Stratoflex v. Aeroquip Corp., 713 F.2d 1530, 1534 n.4 (Fed Cir. 1983).

E. Levinson's Failure to Create a Genuine Dispute

Here the Court determines that Levinson has not met his burden of establishing a genuine dispute as to infringement sufficient to preclude granting Budd's motion for summary judgment. Levinson has presented nothing that suggest infringement by Budd except a brief letter from his former attorney. Even that letter alleges infringement of Levinson's claims only in a conclusory manner, unsupported by any documentation

or cogent reasoning.[1] Even now that Levinson has been permitted to amend his complaint to add allegations that Budd has infringed claims 7 and 13 of patent '023, the record contains no affidavits or other documentation that Budd's package infringes upon his patent claims.

Instead the Court has before it in both the original and the amended complaint only a series of ipse dixits by the plaintiff. For example, in Count I, par. 6, Levinson simply states that Budd has infringed claims 1, 3, 5, 6, 7, 11, and 13 of '023. (The unadorned addition of claims 7 and 13 is the only recognizable change present in the amended complaint.) Levinson offer no cognizable support for his claims. In Count III, pars. 8 and 9, Levinson alleges that between June 7, 1988 and January 6, 1989 he informed Budd that it was willfully infringing his patents and that Budd told him it was not infringing. Similar conclusory allegations of infringement are contained in Count III, pars. 11 and 12. The only allegation of even superficial substance in the complaint is found in Count III, par. 10 which states in full, with emphasis as presented in the original.

> On February 22, 1989, BUDD's wrote that BUDD considered it did not infringe. BUDD alleged that BUDD's cardboard box was identical to a prior art box reported on in a magazine article. The magazine article reported that the prior art box,

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1. The Court finds Levinson's deposition statement equally uncompelling. He offered the following answer as proof that Budd's packaging infringes his own:

"When I looked at Budd's box for the first time, it was like a mother looking at her baby."

The pages that follow indicate Levinson's feelings about his inventions but they in no way establish an inference that his patents were infringed.

when used in a microwave oven, melted onto and stuck to the microwave oven's shelf, the glue holding the box together melted and the flaps on the box opened and the box filled with scalding water. In contrast, the box taught and claimed in LEVINSON's patents at issue, in operation, did not melt onto and stick to the shelf, the glue holding the box together did not melt, the flaps on the box did not open and the box did not fill with scalding water. Identical to the box claimed in LEVINSON's patents at issue, in operation, BUDD's box does not melt onto and stick to the shelf, the glue holding the box together does not melt, the flaps on the box do not open and the box does not fill with scalding water. LEVINSON informed BUDD that the magazine article, that BUDD brought to LEVINSON's attention, did not support BUDD's allegation of non infringement, but the magazine article fully supported Levinson's charge of literal infringement.

Even accepting as valid the claims of Levinson's patents, the Court determines that Levinson offers nothing to rebut budd's test and documentation that indicates its packaging represents art available prior to Levinson's patents. The unspecified magazine article, (cited in Levinson's Count III, par. 10), describing the undesirable attributes of earlier packaging provides no cogent support for Levinson's claims that Budd's packaging infringes on his claims. Further, Budd has submitted unrebutted certifications that the effectiveness of microwave heating in Budd's pie package is undifferentiable (and, therefore without advantage over conventional packaging) from heating in several other

readily available packages, (Shifman Decl., par. 5-17),[1] and that the Litton cookbook cited earlier placed in the public domain the idea of microwaving food in a foil metal tray in its original paper carton. Thus, no matter what combination of these elements is employed, if both the pie in its paper shipping container and the microwave that heats it were established in and obvious from the prior use, they cannot infringe claim 12 of patent '991 or any of the claims brought by Levinson including the claims permitted by amendment of his complaint,[2] even if those claims in combination with others may have provided him with a valid patent.

Even when consideration of claims 7 and 13 for Levinson's patent '023 is added to the Court's infringement analysis, the Court still determines that the description of Budd's package reflects microwaving

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1. As noted in this Court's earlier opinion in this matter denying Levinson's motion for summary judgment, Levinson simply provides no persuasive rebuttal of the Shifman test findings.

2. Plaintiff's reliance on L & A Prods, inc. v. Britt Tech Corp., 365 F.2d 83 (8th Cir. 1966) for the proposition that patentability is not defeated by the fact that the challenged claims embrace only elements that were well known in the prior art, (id. at 86), is misplaced, and the case is distinguishable. First L & A Products was a patentability case, not an infringement case. Moreover, even if the Court assumes, as it must absent proof to the contrary, that Levinson's patent claims are valid, they cannot be infringed by Budd's use of the prior art. Finally, simple common sense indicates that, given materials that duplicate the prior art, Budd's instructions to leave its microwavable package closed rather than open fall into the category of obviousness and do not appear to rise to the level of a technical infringement of a patent.

capabilities that are not readily distinguishable from the prior art. Claim 7 describes a "heating member, according to claim 5, which includes: water-proofing means located on at least a part of the exterior of said chamber.

Claim 13 states

> In a microwave oven comprising an enclosure for receiving an article and means for emitting microwave energy to said article, for use in said oven, an improved microwave-permeable heating member defining a heating chamber for processing said article therein, access means both to said enclosure and said heating chamber to permit the insertion and removal of said article, said improved heating member comprising in combination: a microwave-reflective, heat-conductive container with at least one surface designed to shield from exposure to microwave energy a first area of said article when said article is located in contact thereon, means to permit microwave energy to selectively heat a second area of said article remote from said surface when said article is located on said surface, and where said heating member completely encloses said container.

In this summary proceeding, therefore, the Court determines that plaintiff/nonmovant Levinson has submitted no more than "metaphysical" evidence that the claims of his patents '023 and '991 (as presented in his original complaint) have been infringed by Budd's cardboard packaging, Levinson's submissions on this record are insufficient to defend successfully Budd's motion for summary judgment. Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). In the

absence of any submissions by plaintiff Levinson that would permit an inference that the claims of his patent were infringed, this Court determines that, as a matter of law on this record, Budd's [illegible]t pie package does not infringe the patent claims advanced in Levinson's original or amended complaints.

F. Levinson's Cross-Motion for Summary Judgment

For the reasons set forth in the preceding section of this Opinion, Budd's use of a cardboard carton and aluminum tray and instructions for microwaving have not been shown to infringe Levinson's claims of exclusive rights to the same structures.

III. CONCLUSION

For the forgoing reasons, Budd's motion for summary judgment is granted; Levinson's motion for summary judgment is denied.

John W. Bissell, U.S.D.J.

Dated June 15, 1990

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 89-1297
Melvin L. Levinson v. Budd Foods, Inc.

OPINION
Filed August 23, 1990
Not for Publication

This matter arises before the Court pursuant to a motion by plaintiff Melvin Levinson for reconsideration of this Court's Order of June 15, 1990 granting a motion by defendant Budd Foods, Inc. (Budd) for summary judgment and dismissal of the complaint, and denying a motion by plaintiff Levinson for summary judgment.

I. Facts and Background

The facts an procedural posture of this patent infringement litigation are set forth in detail in this Court's Opinion and Order of June 15, 1990, at 2-6. Briefly stated, plaintiff has alleged that Budd's pot pie packaging and microwaving instructions infringed several claims of two patents issued to him. The Court determined that there was no genuine dispute that Budd's packaging was indistinguishable from the art prior to the dates of Levinson's patents, and that, as a matter of law, Budd had not infringed any of Levinson's patent claims. Id., at 13, 14.

Now Levinson has moved for reconsideration of the Court's Order.

II. Discussion

A. The Standard for Addressing Motions for Reconsideration and Reargument.

Rule 12I of the General Rules of the Court governs motions for reargument. It states in relevant part:

> A motion for reargument shall be served and filed within 10 days after the filing of the Court's order or judgment on the original motion. There shall be served with the notice a memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court has overlooked.

B. Application of the Rule 12I Standards to the Present Motion.

Citing the statement in Lemelson v. TRW, Inc., 760 F.2d 1254 (Fed. Cir. 1985) that "each claim must be examined on its own merits," plaintiff Levinson's first contention here is that the Court set a new, and by implication, improper precedent by considering all the claims of his two patents as a single claim. However, this Court did not overlook either the Lemelson case or its ruling. Rather, after quoting from Lemelson, the Court expressly determined that all the claims of both of Levinson's patents described either a heating method or a package type and, for that reason, the Court analyzed the two sets of claims as units. Opinion of June 15, 1990 at 9 n.2. Analysis of each separate claim would have netted the same result. The Court here reiterates that determination.

Next Levinson contends that although he amended his complaint by leave of this Court, Budd did not contest his allegations that claims 7 and 13 of his '023 patent had also been infringed. Levinson asserts that the Court's ruling of non-infringement of these claims was arbitrary. See Levinson Br., at 5. However, this Court discussed at length what appears to be Levinson's

chief contention: namely, that his packaging constitutes a "heating member (that) completely encloses" the food container and that Budd's instructions to leave the pie in its package infringes Levinson's claim 13. The Court determined and here reiterates that whatever Levinson's claims may be, Budd has established that its packaging and its microwaving capabilities are indistinguishable from the prior art. Thus, as a matter of law, Levinson failed to meet his burden to establish infringement of any of the claims of either of his patents.

The Court finds in Levinson's moving papers and accompanying brief no other matters or controlling cases that it overlooked.

III. Conclusion

Plaintiff Levinson's motion for reconsideration is denied.

John W. Bissell, U.S.D.J.

Dated August 23, 1990

APPENDIX C

United States Court of Appeals for the Federal Circuit
Number 90-1521
MELVIN L. LEVINSON, pro se
Plaintiff-Appellant,
v.
BUDD FOODS, INC.
Defendant-Appellee

The following five Court of Appeals rulings:

1. The Court of Appeals' Judgment affirming the District Court's Opinion was filed February 6, 1991.

2. The Court of Appeals' denial of the "Petition for Rehearing" was filed March 1, 1991.

3. The Court of Appeals' Order, denying "Motion to be Granted Due Process," was filed March 8, 1991.

4. The Court of Appeals' Order, denying "Motion to Reconsider Award of Costs," was filed March 8, 1991.

5. The Court of Appeals' Order, declining "Suggestion for Hearing in Banc," was filed March 25, 1991.

were all filed **WITHOUT OPINION**.